

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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ALFRED H. SIEGEL, TRUSTEE OF THE)
CIRCUIT CITY STORES, INC.)
LIQUIDATING TRUST,)
Petitioner,)
v.) No. 21-441
JOHN P. FITZGERALD, III, ACTING)
UNITED STATES TRUSTEE FOR REGION 4,)
Respondent.)
- - - - -

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3 ALFRED H. SIEGEL, TRUSTEE OF THE)
4 CIRCUIT CITY STORES, INC.)
5 LIQUIDATING TRUST,)
6 Petitioner,)
7 v.) No. 21-441
8 JOHN P. FITZGERALD, III, ACTING)
9 UNITED STATES TRUSTEE FOR REGION 4,))
10 Respondent.)
11 - - - - -
12
13 Washington, D.C.
14 Monday, April 18, 2022
15
16 The above-entitled matter came on for
17 oral argument before the Supreme Court of the
18 United States at 11:05 a.m.
19
20 APPEARANCES:
21 DANIEL L. GEYSER, ESQUIRE, Dallas, Texas; on behalf of
22 the Petitioner.
23 CURTIS E. GANNON, Deputy Solicitor General, Department
24 of Justice, Washington, D.C.; on behalf of the
25 Respondent.

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1 P R O C E E D I N G S

2 (11:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument next in Case 21-441, Siegel versus
5 Fitzgerald.

6 Mr. Geyser.

7 ORAL ARGUMENT OF DANIEL L. GEYSER

8 ON BEHALF OF THE PETITIONER

9 MR. GEYSER: Thank you, Mr. Chief
10 Justice, and may it please the Court:

11 The 2017 Act's quarterly fee increase
12 presents a clear and obvious violation of the
13 Bankruptcy Clause's uniformity requirement.
14 Congress arbitrarily divided the country into
15 two different groups and then authorized
16 different fees for identically situated debtors
17 because their bankruptcies happened to arise in
18 different states.

19 There are no regional differences,
20 distinct local conditions, or industry-specific
21 problems justifying this non-uniform treatment.
22 The division is entirely artificial. There's
23 nothing unique about North Carolina or Alabama
24 that justifies a separate bankruptcy system with
25 its own special lower fees. Congress has simply

1 decided to treat the same class of debtors
2 differently because their bankruptcies arose in,
3 say, Virginia instead of North Carolina.

4 The Constitution requires uniform
5 bankruptcy laws. And a bifurcated system that
6 imposes different charges on indistinguishable
7 debtors is not uniform under any ordinary
8 definition. Because the 2017 law is not uniform
9 on its face, it violates the Constitution, and
10 this Court should reverse.

11 I welcome the Court's questions.

12 JUSTICE THOMAS: Mr. Geyser, is the
13 real problem here as to lack of uniformity the
14 fees, the differential fees, or the original
15 division of the country into two different types
16 of districts?

17 MR. GEYSER: I think it's both, Your
18 Honor. I think that Congress has artificially
19 bifurcated the country into two different
20 systems, and now it's charging debtors different
21 fees based on that original bifurcation.

22 Either way, though, Congress is
23 treating an identically situated debtor class,
24 debtors that look alike in every material
25 respect, there's nothing about them that

1 justifies different treatment, and yet they're
2 paying more for their bankruptcies based
3 entirely on where they happen to file.

4 JUSTICE THOMAS: But wouldn't you have
5 a problem if you accept the fact that -- if --
6 if you say that the division is legitimate, then
7 it would seem to follow that the differential
8 fees would not be based on geography?

9 MR. GEYSER: Well, no, Your Honor,
10 because, again, the original division is, in
11 fact, based on geography. And Section 581 makes
12 this clear. The trustee system is divided into
13 48 states, and then there are two holdout
14 districts and -- for Alabama and North Carolina.
15 And there -- there's really no way to cut it
16 other than a geographic distinction.

17 There's no reason that Congress would
18 treat debtors who look exactly the same, who are
19 electronic retailers, any differently because
20 their bankruptcy is in Virginia as opposed to
21 somewhere else. And I think the --

22 CHIEF JUSTICE ROBERTS: Well, but I --
23 I think it -- one answer, ready answer, is,
24 well, they're treating them differently because
25 they're different systems. Now that only makes

1 sense if there's a reason that they're different
2 systems, and I have not been able to figure out
3 what that reason is. What's the reason? Why
4 are there two different systems?

5 MR. GEYSER: There -- there is no
6 reason, Your Honor. It's entirely arbitrary.

7 CHIEF JUSTICE ROBERTS: I know, but
8 some -- there must be some reason it happened.
9 I mean, they just didn't pull out the map and
10 suddenly say let's pick out two states and have
11 them a whole separate system.

12 And if there's a reason for it, then I
13 think it's a very strong case on the other side
14 that, well, the fees in one can be one and the
15 fees in the other can be different, and it's
16 because there's a reason to have two different
17 systems.

18 MR. GEYSER: Your --

19 CHIEF JUSTICE ROBERTS: So what is it?

20 MR. GEYSER: The -- the only reason
21 that we've seen, Your Honor, is politics and
22 local preferences.

23 CHIEF JUSTICE ROBERTS: What do you
24 mean --

25 MR. GEYSER: It's regionalism.

1 CHIEF JUSTICE ROBERTS: -- what do you
2 mean, politics?

3 MR. GEYSER: The -- the bankruptcy
4 judges and the bankruptcy bar in North Carolina
5 and Alabama liked the system the way it was, so
6 they lobbied their -- their Congressmen, who
7 included exceptions in the statute for those two
8 states.

9 The -- the General Accounting Office
10 looked at this in 1992 and said there is no
11 reason to have two different systems. In fact,
12 the -- and the government has conceded in the
13 lower courts there's nothing unique about the
14 bankruptcy system in North Carolina or Alabama
15 that justifies having different bankruptcy laws
16 for those two states alone. It's --

17 CHIEF JUSTICE ROBERTS: So it's just
18 because the bankruptcy judges didn't want to
19 change?

20 MR. GEYSER: The -- the bankruptcy
21 judges in that case, I guess, liked it the way
22 it was, and they didn't want to be part of the
23 U.S. Trustee system. But that -- that, of
24 course, is not a legitimate, relevant, material
25 distinction.

1 Every time this Court has asked is
2 there a relevant basis for drawing lines based
3 on geography -- which, by the way, is exactly
4 what the Bankruptcy Clause says that Congress
5 can't do. It says it has to be uniform laws
6 throughout the United States. And this is
7 clearly not uniform throughout the United
8 States.

9 JUSTICE BREYER: As a procedural
10 matter, suppose that -- you know, that some --
11 some states or bankruptcy judges somewhere say,
12 you know, we want to start court at 11. We want
13 to start at 11. We think it works better that
14 way. We're refreshed. Okay? So other states
15 say no, 9. And Congress passes a law saying 10,
16 but we'll keep 11 for the two states.

17 All right. I mean, is it -- why can't
18 they try out different things? They like it the
19 way they're doing it. I mean, it works. It's
20 not a substantive law. It's just the way we
21 work it.

22 Now can't we give -- isn't it uniform
23 to give, in certain matters, states and
24 districts their choice?

25 MR. GEYSER: Well, Your Honor, no,

1 it's not. First, there is a way to do that in a
2 uniform manner, but it is not uniform to say
3 that two states get the choice to start at 11,
4 but the other 48 states get no choice. They
5 have to start at 9 or they have to start at some
6 other time.

7 If Congress said that any state has
8 the option to decide when court starts, that's a
9 uniform law.

10 JUSTICE BREYER: So it's against the
11 law of the Constitution to -- to say on
12 procedural matters states get their choice?

13 MR. GEYSER: It -- it -- it's --

14 JUSTICE BREYER: And it is against the
15 law to say some states get their choice, but
16 others don't, and the reason is because the
17 states that get their choice have a system which
18 has led them to ask us, because they feel very
19 strongly, about using it one way or the other?
20 That's not a valid reason? I don't know. Maybe
21 it is. Maybe it isn't. What do you think?

22 MR. GEYSER: I -- I don't think it is
23 a valid reason, Your Honor, precisely because
24 the Constitution constrains the top-down choices
25 that Congress makes in that they have to be

1 uniform choices.

2 CHIEF JUSTICE ROBERTS: Well, surely,
3 they can make different choices on something,
4 right? You know, one district decides they're
5 going to buy, you know, computers from computer
6 company A, and another says no, we're going to
7 buy them from B, right? So they can have
8 differences to some respect.

9 MR. GEYSER: Well, again, Your Honor,
10 I think it depends on where are those
11 differences being introduced. Are they being
12 introduced by Congress, where Congress is saying
13 that some states have to buy from Company A as
14 opposed to Company B, or if Congress says any
15 district can buy computers wherever they'd like?

16 JUSTICE BREYER: Yeah, but is there
17 any state --

18 CHIEF JUSTICE ROBERTS: Yeah, but --
19 but wait. I don't know. I'm sorry. Which one
20 is good and which one is bad?

21 MR. GEYSER: The one where Congress is
22 setting the same rule, standard, choice,
23 framework for every district in every state in
24 the country. That avoids the concerns of
25 regionalism. Then any regional differences

1 introduced at a local level --

2 JUSTICE KAVANAUGH: But then, even
3 under the Chief Justice's hypothetical in the
4 computer-buying program, if it's in the statute
5 itself, that would be a violation of the
6 Uniformity Clause?

7 MR. GEYSER: Well, that -- that may
8 not be a law on the subject of bankruptcies,
9 Your Honor, so it may be exempt --

10 JUSTICE KAVANAUGH: Okay.

11 MR. GEYSER: -- on that basis.

12 JUSTICE KAVANAUGH: And that gets to
13 the point, how do you define the subject of
14 bankruptcies, which goes to, I think, Justice
15 Breyer's question as well?

16 MR. GEYSER: Well, I -- I think it
17 does, but I think -- here, we have something
18 that is very clearly on the subject of
19 bankruptcies. Now this Court has said it's very
20 hard to define, but the Court has also said that
21 Congress's power extends to the entire subject
22 of bankruptcies.

23 And, here, we're talking about a
24 statute that is called bankruptcy fees. It
25 applies in bankruptcy cases. It's for the

1 bankruptcy trustee to do bankruptcy tasks. It
2 specifically allocates the debtor's resources in
3 the bankruptcy estate to trustee fees as opposed
4 to creditors or back to the debtor itself. So
5 --

6 CHIEF JUSTICE ROBERTS: But it's not
7 about -- but it's not about bankruptcies. It's
8 not like you have a different rule of priority
9 in discharging debts, right?

10 I mean, could they have a rule -- I
11 mean, things are more expensive in New York than
12 they are in North Carolina, so they say you can
13 charge fees up to \$200,000 a quarter in New York
14 but only \$50,000 a quarter in North Carolina?

15 MR. GEYSER: Well, Your Honor, I think
16 what they can do is say you can charge market
17 rates. And then -- and that's legitimate for
18 two reasons.

19 First, it's a uniform law. Every
20 state can charge a market rate. That's the same
21 standard -- there's no danger there that the
22 framers would have been concerned about, about
23 Congress favoring certain states or certain
24 regions over others --

25 JUSTICE KAVANAUGH: But the --

1 MR. GEYSER: -- because everyone has
2 the same -- the same framework.

3 JUSTICE KAVANAUGH: -- but the -- the
4 debtor in that example would be paying -- the
5 debtors would be paying different rates
6 depending on where they were --

7 MR. GEYSER: Exactly.

8 JUSTICE KAVANAUGH: -- just as now.
9 So why is that better?

10 MR. GEYSER: Well, it's -- it's
11 different, and it's different for -- in a very
12 profound and important way. It's different
13 because those are different effects.

14 Now the Constitution and its text says
15 there have to be uniform laws. It doesn't say
16 the effects have to be the same. And that's why
17 this Court in -- in the Moyses decision said
18 there's no problem with saying states can create
19 their own exemptions.

20 Every state can craft whatever
21 exemptions it wants. That's fine. Any
22 deviation is introduced at the local level.
23 It's not introduced, again, top-down, where
24 Congress is dictating a specific role for some
25 regions but not others.

1 JUSTICE BARRETT: Mr. Geyser --

2 JUSTICE BREYER: But, in this case,
3 did they have -- before I -- I'm just finishing
4 up with the Chief.

5 Was there any evidence that any of the
6 48 states that have the trustee system said to
7 Congress in any way, we want to have the other
8 system? We want the freedom to choose?

9 I think the answer is going to be no.

10 MR. GEYSER: I -- I don't --

11 JUSTICE BREYER: And I think it's
12 pretty tough to say -- so my thought was, if the
13 answer is no -- I'm giving you time to think
14 whether the answer is no. But, if the answer is
15 no, there isn't really much difference, I can't
16 see it, between a system which says you two
17 states get this old system because you're the
18 only ones who asked for it.

19 That seems logical, but you now can
20 answer yes or no if you remember the question.

21 MR. GEYSER: Well, I -- I do remember
22 the question. I'm not aware of any evidence
23 either way, Justice Breyer, but I think the
24 important thing is, if Congress is concerned
25 that some states may want to opt out or opt in,

1 then Congress can say any state can choose. The
2 districts in any state can decide to opt in or
3 out of the trustee system, and then they'd have
4 a uniform law. Any variation comes at the local
5 level, and --

6 JUSTICE KAGAN: Can I -- can I take
7 you back to Justice Thomas's first question?
8 Because Justice Thomas said let's just presume
9 that the original act here, the separation of
10 these two states, is constitutional.

11 And I realize you have arguments that
12 it's not. But let's just presume it is. At
13 that point, doesn't this have to be
14 constitutional as well because isn't -- isn't
15 this second differentiation, if you will, just
16 really responding in a sensible way to the
17 effects of the first differentiation?

18 In other words, it's -- at that point,
19 it's not arbitrary and it's not solely
20 geographic. It's saying, you know what, these
21 two -- these two states are not in the same
22 financial position as the other 48 states are.
23 They don't need -- they aren't self-financing,
24 so they don't need these higher fees.

25 Wouldn't that be a completely

1 rational, appropriate thing for Congress to do
2 if the original differentiation was okay?

3 MR. GEYSER: I don't think so, Your
4 Honor, and I think for a few different reasons.

5 One is that even if the underlying
6 system is somehow legitimate, it's perfectly
7 fine for Congress to have these different
8 systems for different states, there's still no
9 reason that Congress has to impose fees and make
10 the U.S. Trustee program alone self-funding.
11 There's nothing inherent about the trustee
12 program that requires self-funding. That's a
13 separate and subsequent policy choice.

14 So Congress took the identically
15 situated debtors who happened to be in that
16 program and said, you pay for your bankruptcies
17 while the favored debtors over here in these two
18 states, the taxpayers will fund the identical
19 tasks. So I think that that --

20 JUSTICE KAGAN: But I -- I thought
21 that the -- the question of whether it was
22 self-funding, that that's part of the initial
23 separation of the 48 and the two, that the two
24 were essentially walking into a system where
25 there was an appropriation, and the 48 were --

1 were walking into a system where there wasn't an
2 appropriation and that they needed to be
3 self-funding. So that's part of the original
4 differentiation.

5 And now, as part of the sort of second
6 level, it's like, oh, gosh, this self-funding
7 thing didn't work out so well, not enough money
8 is walking in the door, we have to increase the
9 fees.

10 MR. GEYSER: Well, Your Honor, again,
11 I -- that might have been part of an original
12 calculus, but that is its own policy decision at
13 the congressional level to treat identically
14 situated debtors who look exactly the same, I'm
15 going to arbitrarily assign you to this group,
16 other debtors to this group, and depending
17 solely on geography where they happen to file
18 for bankruptcy, some are better off than others.

19 This Court has never approved that in
20 any case. It's always looked for a material
21 relevancy --

22 JUSTICE KAGAN: But then you're saying
23 we really have to address the first question of
24 whether the differ -- the original 48/2
25 differentiation was permissible because it was

1 in that original differentiation that the --
2 that the two separate funding systems were set
3 up, wasn't it?

4 MR. GEYSER: Well, it -- it was, Your
5 Honor, but I think it was also then struck down
6 or at least the Ninth Circuit purported to
7 strike it down precisely because it's not the
8 same.

9 And just to be very clear, and my
10 friend might correct me soon, but, in the
11 government's brief, the only justification they
12 offer for the dual system to say why this is
13 possibly legitimate is it is effectively a
14 single system that has different labels.

15 It performs its same tasks. It's
16 doing the same things. The debtors can't tell
17 the difference. But the problem is, once
18 Congress layers on top of that system
19 differential fees, then there is a material
20 distinction and debtors then are worse off based
21 entirely on geography.

22 So I don't think even if the
23 underlying system is somehow legitimate in some
24 world where there's a uniformity provision in
25 the Bankruptcy Clause that says Congress can't

1 have different bankruptcy laws for different
2 parts of the country, I think the government's
3 own defense breaks down immediately once they
4 attach different fees to the different
5 districts.

6 JUSTICE BARRETT: Mr. Geyser, I'd like
7 to take you back to Justice Kavanaugh's point
8 about the scope of the Bankruptcy Clause because
9 I think it's important to the scope of your
10 argument.

11 You know, if the Bankruptcy Clause
12 itself, augmented by the Necessary and Proper
13 Clause, could be pretty broad and I understand
14 your argument to be the more specific controls
15 and so Congress can't circumvent the uniformity
16 limitation on its bankruptcy power by relying
17 on, say, the commerce power, its power over
18 inferior tribunals.

19 If that's pretty broad, doesn't this
20 uniformity restriction become pretty
21 significant? You know, think of the Chief's
22 hypothetical about different computer
23 purchasing.

24 MR. GEYSER: Well, it -- it -- it does
25 and it doesn't, Your Honor. First, it's not

1 just our distinction. This is the Gibbons
2 decision, makes the argument for us and says
3 that Congress can't look to a different power in
4 order to override the affirmative restriction in
5 the Bankruptcy Clause.

6 But I -- I don't think this is putting
7 that much of a restriction on what Congress can
8 or can't do. And I think the proof of it is the
9 government can't identify a single law other
10 than the 2017 fee increase and the creation of a
11 dual system in the first place that falls under
12 our understanding of the Bankruptcy Clause.

13 Congress just has to legislate
14 uniformly. It just has to give every district
15 the same rights. It has to have the same
16 standards and framework and choices. And once
17 Congress does that, then there's no danger of
18 regionalism, which is what prompted the
19 uniformity provision in the Constitution in the
20 first place.

21 The states were ceding power to the
22 federal government, and they didn't want a
23 situation where the federal government would
24 turn around and favor certain regions over
25 others.

1 If Congress simply passes a uniform
2 law and gives every state the same choice and
3 the same options, there's no danger of
4 favoritism.

5 JUSTICE BREYER: Well, Congress passes
6 a law and it says in States 1 through 10, the
7 bankruptcy judges will meet in the same
8 courthouse as the federal district judges. In
9 10 other states, it says they're going to meet
10 in different courthouses. And in -- and in
11 several other states, it says it's up to the --
12 it's up to the chief judge of the federal
13 district court.

14 Okay? Non-uniform. They can't do
15 that?

16 MR. GEYSER: Again, Your Honor, I
17 think, if Congress wanted to do that, it could
18 very easily rewrite the law to say that every
19 state gets the option. Now --

20 JUSTICE BREYER: They don't want to
21 give every state the option. In certain places,
22 Congress decides that it's a very helpful thing
23 to the likely litigants to meet in the same
24 courthouse.

25 MR. GEYSER: And --

1 JUSTICE BREYER: And I just want to
2 know, that's their decision, and they think, in
3 other states, the opposite is true. I
4 understand that. And in some states, they think
5 it doesn't matter. So that's what they enact.
6 In other words, they give a choice, and it seems
7 it doesn't -- well, there we are. What do you
8 think of that?

9 MR. GEYSER: I -- I think it's a
10 non-uniform choice.

11 JUSTICE BREYER: Non-uniform. Okay.
12 So now we're going to have to go street by
13 street? They can have -- I mean, I don't know
14 the implications of your argument.

15 MR. GEYSER: It will --

16 JUSTICE BREYER: What's the furthest
17 you've ever found in any case which says this is
18 too non-uniform, it violates the clause?

19 MR. GEYSER: Well, first, Your Honor,
20 I just want to be very clear that the -- the law
21 that you're talking about may or may not be the
22 law in the subject of bankruptcies if it's just
23 simply saying that where judges happen to meet,
24 whether it involves bankruptcy or not or
25 something like that.

1 JUSTICE BREYER: I'm not -- I'm not --
2 I understand my example is not perfect. What
3 I'd like to know is, what case have you found
4 that in your opinion goes the farthest in saying
5 something is non-uniform in the bankruptcy area
6 and, therefore, unconstitutional?

7 MR. GEYSER: Well, this Court has
8 only -- and admittedly struck down one law for
9 being in violation of the uniformity provision.
10 That's because Congress normally doesn't create
11 different bankruptcy systems for different parts
12 of the country.

13 JUSTICE BREYER: The law in which we
14 struck it down, the non-uniformity was what?

15 MR. GEYSER: It was a law that singled
16 out a certain railroad for special treatment.
17 Now -- but the important thing is the Court's
18 rationale in doing that, unlike what my friend
19 says, was not that it was like a bill of
20 attainder. Congress looked and said that there
21 are similarly situated debtors that looked the
22 same in every relevant respect who are not
23 covered by this exception for this single
24 railroad and said Congress can't do that.

25 And if you look to that case and the

1 Gibbons case and then Ptasynski, which is in the
2 tax context, but this Court has said that you
3 look at the uniformity provisions in a similar
4 way. This Court always asks, is there a
5 material, relevant distinction that justifies
6 Congress dividing lines between debtors?

7 And we're not saying there aren't hard
8 cases and there aren't going to be some
9 questions that push the edges of what falls
10 within the subject of bankruptcy or what might
11 be uniform or not. But this is a very easy one.

12 This is, again, a bankruptcy fee.
13 It's dividing up the bankruptcy estate. Money
14 is going to the trustee instead of creditors
15 based on an act of Congress that is saying
16 debtors who file bankruptcy in two states and
17 only two states must pay this fee while the
18 debtors in 48 -- or, I'm sorry, in the 48 states
19 must pay it, while the debtors in two have the
20 option of paying it or not.

21 CHIEF JUSTICE ROBERTS: What -- what
22 exactly was the concern at the time of the
23 framing that led the framers to put this clause
24 in the Constitution?

25 MR. GEYSER: The -- the Court in

1 Gibbons noted that there was very meager
2 discussion of why this was placed in there. But
3 the Court in -- in Gibbons and in Ptasynski,
4 looking, again, at both the tax context and at
5 the bankruptcy context and comparing the two,
6 said one concern is regionalism. It's the
7 concern that Congress can treat different
8 regions of the country in different ways and can
9 give favorable treatment to some states and not
10 others. And that's exactly the type of concern
11 that could arise with a law like this.

12 CHIEF JUSTICE ROBERTS: But, I mean,
13 was there an actual, I don't know, a particular
14 episode or was there a particular concern? Was
15 one region of the country more likely to have a
16 bunch of people going bankrupt as opposed to
17 another or --

18 MR. GEYSER: No, Your Honor, and,
19 again, this is -- the Bankruptcy Clause sort of
20 stands out for the lack of discussion. The way
21 the Fifth Circuit framed it is it's sort of
22 ironic that something that was so
23 uncontroversial at the time now is a pretty
24 great controversy because there's so little
25 commentary about what it meant.

1 But I do think the clause is clear on
2 its face. A uniform law throughout the United
3 States can't possibly mean a system where two
4 states have differential treatment and 48 states
5 have a different rule.

6 JUSTICE SOTOMAYOR: Counsel, I -- I --
7 I'm having a difficulty because you're trying to
8 establish a broad rule in a situation that I
9 don't think lends itself to it given our case
10 law.

11 So we know regional differences can
12 exist. And you accept that. You -- you accept
13 that if Congress permits the 50 states to set
14 their own fees based on their own needs, that's
15 okay, correct?

16 MR. GEYSER: That's correct if it's --

17 JUSTICE SOTOMAYOR: And we've also
18 said that where Congress enacts geographically
19 limited laws when responding to a geographically
20 limited problem, that's okay too. That was the
21 Railroad Reorganization Act, correct?

22 MR. GEYSER: That -- that's right.

23 JUSTICE SOTOMAYOR: So we don't want
24 to announce a rule that says your laws have to
25 be uniform all the time because there may be

1 some rational basis to create a difference,
2 correct?

3 MR. GEYSER: That -- that's right,
4 Your Honor. But --

5 JUSTICE SOTOMAYOR: All right. Now
6 let me stop. I think where the problem is
7 here -- and I understand the gut feeling, okay?
8 The gut feeling is what you shouldn't be able to
9 do is to say this state is going to let the
10 taxpayers pay for something, and the other 48
11 states don't have that choice. That's your
12 problem, isn't it?

13 MR. GEYSER: It's that problem plus
14 the arbitrariness of the initial division.

15 JUSTICE SOTOMAYOR: I -- I understand,
16 but you see what my problem with that is, that I
17 don't see why Congress can't say you can have
18 different systems in some places with respect to
19 others where it's not the taxpayers paying. If
20 this system stands and we just strike down the
21 fee difference, then I don't see why we couldn't
22 keep this going on forever?

23 MR. GEYSER: Well, I -- and I think
24 you debatably could. And just to be very clear,
25 we do think that the original division is

1 unconstitutional because it is non-uniform.

2 Now I don't -- I'm not sure the
3 original division, absent fees, creates any
4 Article III injury for any debtor because the
5 programs are so similar. But, once you attach
6 the fee on top of it, now you have identically
7 situated debtors that look exactly the same who
8 are being prejudiced because they filed
9 bankruptcy in one of 48 states.

10 JUSTICE SOTOMAYOR: You see, I just
11 don't want to write a decision that says
12 Congress couldn't do what it did here, which is
13 to have eight states experiment with this
14 different system to see if it worked or not and
15 then decide it's a better system than we have
16 and create it generally and let some people keep
17 the old system.

18 What I have a problem with is creating
19 a system permanently that lets the taxpayers
20 assume costs for two states but don't give the
21 other 48 a choice.

22 MR. GEYSER: And I think you could
23 write a narrow decision that addresses the
24 current situation that leaves aside whether
25 Congress does have any freedom to experiment --

1 JUSTICE SOTOMAYOR: All right.

2 MR. GEYSER: -- in this area.

3 JUSTICE SOTOMAYOR: May I ask you one
4 final question, which is you assume that we have
5 to level up and give you the choice of paying
6 less money, but I don't know what
7 constitutionally in our case law requires us to
8 give you that remedy, meaning we've also said
9 that if Congress -- if we think Congress wants
10 us to level down, we should. And, here,
11 Congress has given us a clear indication it
12 wants leveling down. It told the -- the court
13 system you have to level down. You have to
14 raise the fee. Correct?

15 MR. GEYSER: No. No, Your Honor. And
16 -- and just to be very clear about this, I think
17 Congress has indicated the opposite. When
18 Congress changed the word "may" to "shall" to --

19 JUSTICE SOTOMAYOR: Yes.

20 MR. GEYSER: -- to ensure going
21 forward that there will be uniform treatment,
22 which shows how easy it is for Congress to have
23 not done this in the first place, Congress made
24 that change prospective only. Congress was
25 aware of the constitutional challenges. There

1 were courts that had already struck down the
2 2017 Act as unconstitutional. Congress could
3 have said: Ah, this always should --

4 JUSTICE KAVANAUGH: But --

5 MR. GEYSER: -- have been that way.
6 Everyone who hasn't paid now needs to pay.

7 JUSTICE KAVANAUGH: -- Con- --

8 MR. GEYSER: They made the opposite
9 determination and let the --

10 JUSTICE SOTOMAYOR: Please answer --

11 JUSTICE KAVANAUGH: Congress --

12 JUSTICE SOTOMAYOR: Oh, I'm sorry.

13 JUSTICE KAVANAUGH: I want to make
14 sure you're finished. But Congress was
15 operating at that point under the understanding
16 of what the Judicial Conference had done,
17 though, which was to raise the fees in those
18 other districts.

19 MR. GEYSER: Raise the fees but
20 prospectively only, which -- which actually --

21 JUSTICE KAVANAUGH: Starting in the
22 third quarter of 2018, right? And Congress then
23 acts in 2020 and accepts those raised fees and
24 says, in the text of the statute, right, that
25 this confirms the long-standing intention of

1 Congress that the quarterly fee requirements
2 remain consistent. And that's at the time when
3 the Judicial Conference has already acted,
4 correct?

5 MR. GEYSER: Already acted but, again,
6 just to be very clear, and said that any case
7 going forward that's filed after the Judicial
8 Conference act. So any -- any debtor in the two
9 states that filed in September of 2018, they
10 didn't have to pay increased fees for that
11 entire period.

12 JUSTICE KAVANAUGH: Just on this
13 remedy point more generally, what are we to make
14 of that this seems to have been a mistake,
15 right? So starting when the standing order went
16 into place, the fees were the same, right? And
17 then the new Act in 2017 elevates the fees in
18 the districts that are subject to the standing
19 order of the Judicial Conference kind of late to
20 the game. And then they -- that's corrected,
21 what, nine months later. And then Congress
22 comes in and -- and says, yeah, that's right.

23 I mean, that seems a strange situation
24 if we take our case law on looking for what
25 Congress would have intended -- if we take that,

1 it seems a strange case to order refunds rather
2 than to require additional payments.

3 MR. GEYSER: Well, I -- I don't think
4 so, Your Honor. And to be very clear, it wasn't
5 a mistake. Congress chose the word "may" when
6 it added (a)(7).

7 May I finish?

8 CHIEF JUSTICE ROBERTS: Sure.

9 MR. GEYSER: Congress chose the word
10 "may." This is directed to the Judicial
11 Conference. That was the audience of (a)(7).
12 And the Judicial Conference understood from the
13 start it had discretionary authority to act or
14 not. It reminded Congress of this periodically,
15 including in 2007 when Congress tinkered with
16 the fees. It said we will likely match the
17 fees.

18 JUSTICE KAVANAUGH: But -- maybe I'm
19 cutting into my next time. Sorry. After the
20 Ninth Circuit decision, though, then this all
21 gets fixed through a combination of actions.
22 Fixed you might dispute. But it becomes even,
23 the fees that are going to be paid in the -- the
24 various districts, no?

25 MR. GEYSER: No, and just to be very

1 clear, when the Ninth Circuit acted, there were
2 no fees in the bankruptcy administrator
3 districts.

4 JUSTICE KAVANAUGH: Right.

5 MR. GEYSER: But Congress's so-called
6 fix was to create a non-uniform system again
7 that said that, in the 48 states, the fees are
8 mandatory; in the two states, it's entirely
9 discretionary.

10 And it's unclear why Congress did
11 that. They shouldn't have. But the word "may"
12 doesn't mean "shall," especially in a statute
13 that contrasts the two.

14 JUSTICE KAVANAUGH: Well, just in --
15 am I correct, in 2001, the Judicial Conference
16 issued a standing order saying that the fees
17 shall be the same?

18 MR. GEYSER: They -- they did, and it
19 was also clear --

20 JUSTICE KAVANAUGH: Okay. From 2001
21 to 2018, they're the same?

22 MR. GEYSER: They -- they were the
23 same. But, again, it could --

24 JUSTICE KAVANAUGH: And then, in 2017,
25 Congress had passed a new law raising them, but

1 those other districts were kind of, like I said
2 before, behind, and it didn't get changed until
3 the third quarter of 2018?

4 MR. GEYSER: Well, I -- I think two
5 key points, though.

6 The first is that in 2007, the
7 Judicial Conference told Congress when Congress
8 was tinkering with the fees a little bit that it
9 would likely match them. So Congress knew and
10 the Judicial Conference told Congress that they
11 have discretion and they may or may not act
12 consistent with the way they've acted in the
13 past.

14 And in 2017, this was such a drastic
15 increase in fees, this is the first time that
16 the judicial conference would say: Wait a
17 minute, maybe we should exercise our discretion
18 and depart from past practice in making the fees
19 equal.

20 Congress in 2020 had to take away that
21 discretion to ensure uniformity going forward,
22 which is what they should have done in 2017 but
23 didn't.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 Justice Thomas?

2 Justice Breyer, anything further?

3 JUSTICE ALITO: What legal standard do
4 you think governs this issue of leveling up or
5 leveling down as Justice Sotomayor put it?

6 MR. GEYSER: I think that there are --
7 there are two ways to look at it. One is that
8 you first have to ask, are you equalizing the
9 treatment in the relevant period?

10 And so you have to find a viable
11 option that could actually, looking backward,
12 make sure that the same debtors were paying the
13 same fees as their counterparts in other
14 districts.

15 Then from that point, if you've
16 identified a viable option, then it is what
17 would Congress likely want to do. The problem
18 here is that Congress looking back has to say we
19 need to unscramble the egg of, you know,
20 three-plus years of possibly closed bankruptcies
21 and track down the creditors and professionals
22 and administrators, you know, and -- and
23 hundreds of bankruptcies to figure out a way to
24 claw back the funds, assuming that's even
25 constitutionally permissible.

1 So if Congress doesn't have that as
2 viable option, then the only choice is to
3 actually give the favored treatment to the
4 people who were charged too much.

5 JUSTICE ALITO: Okay. So that is your
6 argument. You think it's what Congress would
7 likely do. There's another argument. There's
8 the argument that you challenged the fee that
9 was assessed against you, and, therefore, if
10 that's unconstitutional, you win, end of the
11 game. You don't have to get into what Congress
12 intended, but that's not your argument?

13 MR. GEYSER: I -- I -- I would -- I
14 wish that could be our argument. We would love
15 just to have the automatic right to fees but I
16 do think consistent with this Court's cases, if
17 there is a way to equalize the treatment --
18 because our constitutional injury isn't
19 necessarily that we paid -- just that we paid a
20 high fee. It's that we paid a non-uniform fee.
21 So the remedy just has to correct the
22 uniformity.

23 The problem is the government doesn't
24 have a viable option that's anything other than
25 giving us back the money.

1 CHIEF JUSTICE ROBERTS: Justice
2 Sotomayor? Anything further?

3 JUSTICE SOTOMAYOR: No, thank you.

4 CHIEF JUSTICE ROBERTS: Justice Kagan?

5 JUSTICE KAGAN: Well, this idea that
6 Congress doesn't have a viable option, do we
7 have to think about that through Congress's eyes
8 or is that a question for us? In other words,
9 is there a viable option? If there's not a
10 viable option, we can't tell anybody to claw
11 back the fees because it's not going to happen
12 and then the inequality won't be remedied.

13 So is that a "What would Congress have
14 done" question or is that a question at what you
15 described as the first stage of the analysis?

16 MR. GEYSER: I -- I -- I think -- I
17 think they overlap a little bit in the sense
18 that this Court first has to ask is this
19 something that can actually be done? Is this a
20 permissible choice from a legal standpoint?

21 Because if this would create, for
22 example, a due process problem by -- by having
23 these drastic impositions on absolutely
24 completed conduct, where everyone relied on not
25 having to pay these fees in deciding how to

1 structure a basic bankruptcy plan, then that's
2 not even a choice that Congress can make.

3 And that's a determination this Court
4 can do. It -- assuming the Court thinks it is a
5 viable option, the Court can still --

6 JUSTICE KAGAN: A viable option
7 legally?

8 MR. GEYSER: Legally, exactly. Then
9 the Court can take into account is this such a
10 mess that it's implausible that any rationale
11 legislator would choose this?

12 But again, I think this is easy here
13 for the Court because Congress looked at this
14 problem in 2020 and decided to impose the
15 increase prospectively.

16 JUSTICE KAGAN: And -- and -- and as I
17 understand some of our tax cases and some of our
18 tax cases where we've had this kind of "shall we
19 level-up, shall we level-down" question, we've
20 basically just said, let the government decide
21 which one it wants to do.

22 So why isn't that an appropriate
23 analog?

24 MR. GEYSER: I -- I think in -- in --
25 most of this Court's tax cases involved state

1 taxes so there was an element of federalism not
2 having the federal court dictate for the state
3 government what it would do or wouldn't do.

4 Here we actually have -- we're --
5 we're in the federal system itself, so I think
6 the Court can be a -- a little more assertive in
7 looking and saying what would Congress do and
8 what's permissible to -- to do.

9 But even in the state context, the
10 Court does ask, is there a viable option to
11 equalize treatment looking backwards? And if
12 there isn't, then the state doesn't have the
13 choice, they simply have to refund the fees.

14 And the presumption, by the way, is
15 that the successful plaintiff does get their
16 money back, not that they ruin someone else's
17 day by forcing the state government to kind of
18 track down other people to -- to impose
19 disfavored treatment.

20 CHIEF JUSTICE ROBERTS: Justice
21 Kavanaugh?

22 JUSTICE KAVANAUGH: In the total
23 amount, though, that you're saying Congress
24 would want to sacrifice for this is 324 million,
25 and you think that's what Congress would want to

1 do?

2 MR. GEYSER: The -- the government has
3 said there's \$324 million at stake. We actually
4 don't know. We haven't seen the citation
5 that -- that supports that.

6 What we do know is that the -- the
7 balance in the U.S. Trustee fund right now, I
8 think, could probably cover the full refunds,
9 which just means that the money would go back to
10 the people who were wrongly told to pay it in
11 which case I -- I do think that that's a pretty
12 fair solution for this problem.

13 JUSTICE KAVANAUGH: And then picking
14 up on Justice Kagan's question, the government
15 in its last footnote, footnote 7, says basically
16 punt this to the judicial conference and let
17 them sort out trying to, in essence, claw back
18 some of the fees where that's still possible.

19 Suppose that is possible in some cases
20 but not all cases. Then what?

21 MR. GEYSER: This Court has said that
22 the remedy doesn't have to be strictly perfect.
23 You can't have a situation where they earnestly
24 try and they do a really good job and collect
25 98 percent of the fees, but the 2 percent that's

1 remaining then ends up blowing up the whole
2 system.

3 But I think you would have to look and
4 say, is this a -- could through a good faith
5 effort of truly trying to claw back all the
6 fees, is that something the government could
7 realistically do.

8 And I think it's notable that the
9 government sort of tepidly suggests this is even
10 a possible solution. Their main arguments are
11 that it's perfectly fine to correct problems
12 going forward and to leave the non-uniform
13 treatment in place in the past.

14 And I think that's a pretty telling
15 indication of the government's speaking out of
16 its own self-interest and not in a manner that
17 actually remedies a constitutional wrong.

18 JUSTICE KAVANAUGH: Last quick
19 question. Do you except Morales-Santana as the
20 appropriate inquiry?

21 MR. GEYSER: Yes and no, Your Honor.
22 Yes, in the sense that you do ask how would
23 Congress want to fix unequal treatment. No, in
24 that Morales-Santana was looking for prospective
25 relief --

1 JUSTICE KAVANAUGH: Got it.

2 MR. GEYSER: -- only, so it's a much
3 easier case.

4 JUSTICE KAVANAUGH: Got it.

5 MR. GEYSER: We're -- we're only
6 talking about retrospective backward look
7 relief.

8 JUSTICE KAVANAUGH: Thank you.

9 JUSTICE SOTOMAYOR: Counsel --

10 CHIEF JUSTICE ROBERTS: Just --

11 JUSTICE SOTOMAYOR: -- may I, just one
12 question?

13 CHIEF JUSTICE ROBERTS: Sure.

14 JUSTICE SOTOMAYOR: Counsel, on this
15 issue, does the point that which you object make
16 any difference? Meaning you paid this fee for a
17 year. You then went in and objected and asked
18 the Court below to stay your paying.

19 I don't know how many other debtors
20 did that? Does that enter into this calculus of
21 the 324 million? I mean, I'm assuming some
22 debtors' cases have been closed and they've paid
23 the fee. Why should they now -- why should we
24 upset that apple cart?

25 MR. GEYSER: And -- and the Court may

1 not have to. I mean, we're -- we're -- we're
2 not a class action. We're an individual debtor
3 action. We objected. And we -- we'd like
4 the -- the money back that we shouldn't pay.

5 We're not saying the government can't
6 assert waiver and forfeiture and oppose opening
7 cases. Those are questions for those other
8 debtors in those other cases and they really
9 don't affect the proper inquiry here.

10 JUSTICE SOTOMAYOR: So if we said claw
11 back, if we left it open for the court below to
12 decide each case individually, why is that
13 wrong?

14 MR. GEYSER: I -- I think the Court
15 could try that. Now, I -- I -- just full
16 candor, I do think that in terms of structuring
17 the remedy of what would the legislature want,
18 that's a question that debatably applies more on
19 a global level.

20 JUSTICE SOTOMAYOR: I agree.

21 MR. GEYSER: But -- but, yeah, I don't
22 think there's anything that prevents this Court
23 from saying we objected, we have fees that we
24 would like back, we have an open case.

25 And the proper constitutional remedy

1 is to equalize the treatment by having us pay
2 the lower fees. And any other debtor has to
3 litigate on -- on their own terms based on their
4 own procedural posture.

5 JUSTICE SOTOMAYOR: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice
7 Barrett?

8 JUSTICE BARRETT: Just a very small
9 clarification to an answer you gave Justice
10 Kagan. When she asked you about the analogy to
11 the tax context, you said, well, because of
12 federalism, you know, the court has more
13 differential but we can be more assertive here
14 because we're in the federal system.

15 Do we have to be more assertive here?
16 It seems attractive in a lot of the questions
17 have assumed that maybe it's best to let --
18 if -- if -- assuming we agree with you on the
19 merits, then it would be best to let either the
20 lower courts, the judicial conference sort this
21 out.

22 MR. GEYSER: Well, we -- we hope you
23 do agree with us on the merits. I think if the
24 Court would like to remand to the lower courts
25 to sort out the remedy question, that's

1 certainly an option.

2 But I -- what I was trying to say and
3 just not as artfully as I should have is that
4 you don't have the added dynamic of a federal
5 court instructing a state government about a
6 state policy question.

7 So that -- that is at least removed
8 and off the table. And I do think this Court
9 can look and apply the same framework it's
10 applied in the other cases and say, is this
11 something that a rationale legislative body
12 would try to do?

13 Again, especially in light of the
14 congressional determination in 2020 not to do
15 this, and not impose retroactive fees when they
16 could easily could have.

17 JUSTICE BARRETT: Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 MR. GEYSER: Thank you.

21 CHIEF JUSTICE ROBERTS: Mr. Gannon.

22 ORAL ARGUMENT OF CURTIS E. GANNON

23 ON BEHALF OF THE RESPONDENT

24 MR. GANNON: Mr. Chief Justice and may
25 it please the Court:

1 Over the past 35 years, quarterly fees
2 paid by Chapter 11 debtors have sometimes
3 differed across districts, but those differences
4 did not violate the uniformity requirement of
5 the Bankruptcy Clause as illustrated by the wide
6 variations in fees that were permitted under the
7 first two bankruptcy acts enacted by Congress in
8 1800 and 1841.

9 Such fees are either not subject to
10 the uniformity requirement or their variation
11 comports with what this Court has called the
12 flexibility inherent in the constitutional
13 provision.

14 In any event, Congress acted to avoid
15 any potential non-uniformity in 2000 by adopting
16 the recommendation of the judicial conference to
17 allow the six bankruptcy administrator districts
18 to charge quarterly fees "equal to those
19 imposed" in the 88 U.S. Trustee districts.

20 As Justice Kavanaugh noted, in 2001,
21 the Judicial Conference adopted a standing order
22 directing payment of the quarterly fees in the
23 statutory amounts "as those amounts may be
24 amended from time to time."

25 When Congress amended those amounts in

1 2017, the failure of the bankruptcy
2 administrator districts to implement them in
3 time did not violate the uniformity requirement
4 enclosed on -- imposed on Congress, which asked
5 for equal, not unequal fees.

6 But even if Congress had not requested
7 equal fees, Congress was entitled to respond to
8 a shortfall of funding in the U.S. Trustee
9 program by adopting a trustee-specific solution,
10 and even if there were a constitutional
11 violation because of different fees, the
12 appropriate outcome would not be refunding the
13 increased fees that Congress had required for
14 the districts that accounted for 97 percent of
15 the Chapter 11 filings but an invalidation of
16 the narrow exception for the bankruptcy
17 administrator districts, which Congress has
18 already enacted.

19 That's consistent with this Court's
20 cases about federal remedies in this context.

21 I welcome the Court's questions.

22 JUSTICE THOMAS: Mr. Gannon, would
23 you -- do you think the system is uniform to the
24 extent that you have two different -- you have
25 the trustee system and the administrator system

1 that are quite different? Without getting into
2 the fee structure.

3 MR. GANNON: Well, the only -- as
4 Petitioner's counsel noted, the only difference
5 that anyone has asserted that made a difference
6 to any debtor or creditor is the fees. There
7 are two different programs. There have been two
8 different programs in a sense since 1978 when
9 the pilot program was initiated.

10 And then the -- the U.S. Trustee
11 program went almost nationwide in 1986 with the
12 six-district carveout. And so, since then,
13 there have been two programs. And my friend
14 says that that's on the basis of politics and
15 regionalism. But, with respect, I would say
16 that in the 1990s, when the Judicial Conference
17 was asking to preserve the bankruptcy
18 administrator system in the six districts where
19 it existed and the National Bankruptcy Review
20 Commission recommended not to abolish that
21 separate program, that there was a recognition
22 that there were still these two established ways
23 of going about administering those aspects of
24 bankruptcy procedure.

25 And so they are different programs,

1 but we don't think that that difference in
2 administrative assistance to the way the
3 bankruptcy system operates is covered by the
4 uniformity requirements because it is
5 essentially procedural.

6 JUSTICE THOMAS: So what would you
7 consider subject of bankruptcies that is not
8 procedural?

9 MR. GANNON: Well, as my friend said,
10 the Court has acknowledged that it's -- this --
11 this clause is incapable of final definition,
12 but it has always focused on the relations
13 between the debtor and creditors and things like
14 laws that allow -- that cause the debtor's
15 property to be distributed among creditors as --
16 we call -- we call these the substantive --

17 JUSTICE THOMAS: But --

18 MR. GANNON: -- rules of bankruptcy.

19 JUSTICE THOMAS: Well, let's just take
20 that. I think the argument would be that, in
21 this case, the fees -- the amounts that are now
22 going to pay fees would have been distributed,
23 to the extent there were distributions, to
24 creditors.

25 MR. GANNON: Not every law that will

1 have an effect on how much money is left in the
2 pot at the end of the bankruptcy for
3 distribution to creditors can be a law on the
4 subject of bankruptcies.

5 JUSTICE THOMAS: Well, what --

6 MR. GANNON: And we know that because
7 there are other procedural things that would
8 affect how much money is there.

9 If Congress made changes to federal
10 tax law or employee benefit programs, that would
11 affect priority of claims, the order that claims
12 could get paid. If a bankruptcy court withdraws
13 the reference in an individual case so that it
14 doesn't -- a district court withdraws the
15 reference in an individual case so it doesn't
16 start in bankruptcy court, there's one less set
17 of appellate filing fees that will have to get
18 paid. If somebody wants to appeal to the court
19 of appeals, they won't have to go through the
20 bankruptcy -- from the bankruptcy court to the
21 district court or through a bankruptcy appellate
22 panel before they get to the court of appeals.

23 There are other ways. The state
24 exemption law that the Court upheld in *Moyses*
25 varies state by state. That affects how much

1 money is going to be available in the pot.
2 Nobody thinks that those are laws on the subject
3 of bankruptcies that can't be changed in a way
4 that -- that is covered by -- you know, that
5 those aren't covered by the uniformity
6 requirement.

7 JUSTICE KAGAN: But this is a top-down
8 imposition of a fee structure that predictably
9 can't help but disadvantage both debtors and
10 creditors in two states -- in 48 states as
11 compared to two states.

12 Now, you know, why -- bankruptcies are
13 going to be different in those 48 states, and
14 they're going to be different by virtue of a
15 congressional decision that's directly related
16 to bankruptcy.

17 MR. GANNON: And I think the same
18 thing was true under the 1800 and 1841 Acts
19 where every district was authorized to --

20 JUSTICE KAGAN: Yeah, I don't think
21 so, Mr. Gannon.

22 MR. GANNON: -- set fees at whatever
23 it wanted to set.

24 JUSTICE KAGAN: I mean, at first, your
25 brief -- I read your brief and I thought, oh,

1 that's pretty convincing. And then it turns out
2 it's not so convincing just because, you know,
3 everybody had that choice and they made a
4 choice. So -- so this is Congress making the --
5 making a choice for 48 states and only giving
6 the choice to two states.

7 MR. GANNON: Well, I -- we also think
8 that Congress then told the Judicial Conference
9 it could authorize equal fees. And the Judicial
10 Conference, which had asked for that authority
11 and received that authority, had implemented
12 that authority. And Congress was acting against
13 that backdrop when it enacted this fee increase
14 after the Judicial Conference had said it would
15 stay in tune and had indeed done so in 2007.

16 And so -- and with respect to this
17 question of the equal choice, my friend keeps
18 saying that as long as the rule gives everyone
19 equal choice, that's uniform. That -- I don't
20 think that makes sense for three reasons.

21 First, dealer's choice is a really
22 peculiar definition of uniformity, and it
23 violates his lead premise, which --

24 JUSTICE KAGAN: It's not peculiar if
25 what you're worried about is regional bias.

1 MR. GANNON: Except his -- it -- it is
2 inconsistent with his premise that
3 indistinguishable debtors should not pay
4 different fees because their bankruptcies arise
5 in different states.

6 And, second, letting each district
7 choose can't be the standard that we would be
8 using for substantive rules of bankruptcy. We
9 wouldn't use that for who can be a debtor, what
10 is the estate, what is the scope of a discharge.
11 And those are all different from the procedural
12 questions that Petitioner is trying to pick off
13 with this particular argument.

14 And, third, I would say that this rule
15 is just upside down, that it makes no sense to
16 say that tolerating greater variations in every
17 district and among every district would be more
18 constitutionally uniform.

19 JUSTICE KAGAN: Well, again, I -- I
20 guess I don't see the -- that point if what
21 you're worried about is regional bias. If what
22 you're worried about is regional bias, then the
23 idea of Congress picking select states for any
24 purpose becomes, you know, something that's
25 right in the heartland of what you're worried

1 about.

2 MR. GANNON: Well, it -- it would if
3 you thought that the uniformity requirement
4 applied to this particular type of rule. And we
5 -- we do have the argument that says that we
6 don't think that this is a substantive rule of
7 bankruptcy even though it can have an effect on
8 how much money is left in the pot and a
9 predictable effect.

10 And that's true for lots of other laws
11 that nobody thinks are substantive laws of
12 bankruptcy or laws on the subject of
13 bankruptcies, as I said, like what are your
14 federal tax obligations, what are your -- you
15 know, what -- what is an employee benefit that
16 you have.

17 And those all have predictable effects
18 on what's going to happen in the bankruptcy, but
19 nobody thinks Congress is legislating about
20 bankruptcy when it amends ERISA.

21 And so -- and then we also have two
22 other arguments. One is that there -- this was
23 still equal and, third, that the -- that there's
24 a separate clause, the Inferior Courts Clause,
25 that would be applicable here.

1 And, finally, that to the extent that
2 you take as the background that there are two
3 programs that had been in existence for 31
4 years, at the request of the Judicial
5 Conference, and Congress was entitled to
6 legislate against that backdrop, then it's
7 appropriate, as you and others said during my
8 friend's argument, assuming that Congress can
9 rationally solve the shortfall.

10 And that is solving a geographically
11 isolated problem, which this Court recognized in
12 Gibbons and in the Regional Railroad
13 Reorganization cases is something that the
14 Uniformity Clause allows it to do.

15 JUSTICE KAVANAUGH: What --

16 JUSTICE BARRETT: But, Mr. Gannon,
17 those examples that you give of, say, ERISA,
18 what are your federal tax obligations, those
19 aren't plausible exercises of the bankruptcy
20 power, right?

21 MR. GANNON: They are not. I mean,
22 they could be to the extent that they have
23 predictable effects on bankruptcy. If I -- if I
24 understand my friend to say that if this is
25 going to affect how much money there is here,

1 that's a law on the subject of bankruptcy.

2 And our argument is that there are
3 things that Congress legislates with respect to
4 the bankruptcy system that are definitely laws
5 on the subject of bankruptcies, the substantive
6 rules of bankruptcy. Those are all subject to
7 the uniformity requirement.

8 There are other things Congress has
9 the power to do either as necessary and proper
10 to that or as necessary and proper to saying
11 we've decided we're going to run bankruptcy
12 through inferior courts. We're not going to
13 have it go through an independent agency or some
14 part of the executive branch. And --

15 JUSTICE BARRETT: So facial
16 uniformity, just to be sure I'm -- I'm following
17 this, the facial uniformity requirement applies,
18 in your view, only to what you're describing as
19 substantive bankruptcy regulations like priority
20 for creditors?

21 MR. GANNON: The -- the rules that
22 govern relations between creditors and debtors
23 -- creditors and debtors and things like
24 distribution of the property of the estate, yes.
25 Those are -- those are the substantive rules of

1 bankruptcy and not procedural aspects that --
2 that there have been lots of variations.

3 And the idea that you can't have a
4 pilot program in some districts to test out some
5 procedure, now I don't think that somebody would
6 say we're going to try out a new version of
7 Chapter 11.5 on a trial run in a handful of
8 districts.

9 JUSTICE BARRETT: Well, I understand.
10 But that means that your argument really is --
11 it's -- it's much more important to your
12 argument to distinguish between core bankruptcy
13 power, the substantive law of bankruptcy and
14 bankruptcy administration than, you know, in
15 response to Justice Kagan, you were talking
16 about what I take to be the differences between
17 formal and functional uniformity, saying that
18 your friend on the other side, insofar as he
19 emphasizes the formality of a law that gives all
20 regions a choice, you say, well, that's -- that
21 undermines the point of bankruptcy, that's a
22 funny view of uniformity because it would allow
23 for a lot of disuniformity.

24 But that functional view really
25 doesn't matter if the uniformity requirement

1 doesn't apply to so-called bankruptcy
2 administration.

3 MR. GANNON: Well, it would matter, I
4 think, to -- to my friend's attempt to
5 distinguish the 1840 and -- 1800 and 1841 acts
6 and other procedural requirement -- other
7 procedural variations that happen under the
8 Bankruptcy Code today that there can be
9 bankruptcy appellate panels, there can be
10 referrals to district -- from district courts to
11 bankruptcy judges. There are all sorts of
12 different variations that occur.

13 And those have all been understood, I
14 think, as being not the substantive rules of
15 bankruptcy and, therefore, not covered by the
16 uniformity requirement.

17 And I'm saying that this -- this
18 attempts to say, well, it's a uniform standard
19 because everyone gets equal choice, I don't
20 think, can be the rule that the Court would use
21 as the uniformity standard for everything in
22 bankruptcy because you would not tolerate that
23 for something like who can the debtor -- who can
24 be a debtor who files for bankruptcy.

25 CHIEF JUSTICE ROBERTS: And --

1 MR. GANNON: Well, let every district
2 decide not -- not in an individual court in an
3 individual case, but let each district decide
4 what its rule for who can be a debtor who files
5 a bankruptcy petition can be.

6 JUSTICE BREYER: Well, there are a lot
7 of things. I -- I mean, I'm probably agreeing
8 with you, but, I mean, in Congress, there are
9 dozens of things, come on, this is going to be
10 National Pork Week, you know, and every state
11 has their choice, but you write it, it's
12 National Pork Week for everybody. Anyone want
13 an exception? Anyone who wants an exception
14 comes in, you give them an exception.

15 Okay. I don't really see the
16 difference between saying "may," at least as
17 applied to an awful lot of things that I've had
18 experience with, and saying don't worry,
19 everyone has to do it unless you want an
20 exception as long as there's knowledge.

21 Now what worries me about applying
22 that, what I think is how things work to this
23 is, well, maybe this was done by the judicial
24 conference and maybe that makes it different.

25 MR. GANNON: Well, we do think here

1 that it matters that we're dealing with multiple
2 statutes. Congress initially created the -- the
3 two different programs.

4 JUSTICE BREYER: I understand. But, I
5 mean, would the Judicial Conference -- I mean,
6 I've been in a number of bodies which do decide
7 things that way. Sure, I'll skip the name, what
8 they were, but does the Judicial Conference
9 sometimes work that way?

10 We want a rule here. Oh, anybody
11 wants an exception to a procedural rule, if you
12 want an exception, say so. If not, you're going
13 to be stuck with the general rule. Now, if it's
14 well represented, they'll say so.

15 MR. GANNON: Well, and, Justice
16 Breyer --

17 JUSTICE BREYER: But I don't know if
18 that works that way in the Judicial Conference
19 or not.

20 MR. GANNON: Well, I mean, I think,
21 here, my friend points out that the choice here
22 was Congress's. But I think you're making the
23 point that at the time when the pilot program
24 finished, Congress was looking at the evidence
25 that it had about how successful the pilot

1 program was and it heard from representatives
2 from two states, one of which had participated
3 in the pilot program and didn't like it.

4 The bench and the bar said that we --
5 we prefer not to be subject to the U.S.
6 Trustees, and Congress deferred to that choice,
7 at least for a temporary period, and also did
8 that for another district.

9 My friend says, as long as Congress
10 would have left that option open for every
11 district in perpetuity, that would be fine.

12 I think, effectively, what -- what
13 Congress did was said, well, you know, we've
14 looked. Who -- who doesn't want to join now?
15 And we've concluded that there can be these two
16 different programs and that will be fine.

17 And by the time the Ninth Circuit
18 ruled in the mid-1990s that there was a
19 potential uniformity problem with that, the
20 Judicial Conference was defending the existence
21 of the two programs.

22 JUSTICE KAGAN: So, Mr. Gannon --

23 MR. GANNON: And Congress --

24 JUSTICE KAGAN: -- I mean, suppose --
25 let me give you a hypothetical and it's just

1 going to be a single statute, so you'll have to
2 save your two-statute argument.

3 But it's a single statute and it says
4 we're going to pick four states and they just so
5 happen to be the states of, you know, the chair
6 and the ranking member of the relevant
7 committees in the House and the Senate. We're
8 going to pick those four states and we're going
9 to give them a system in which, you know, fees
10 are a tenth of what they are everywhere else.

11 So, if you're a debtor, if you're a
12 creditor in those four states, it's a magnet --
13 it's a very, very large difference in terms of
14 how the bankruptcy estate comes out and how it
15 gets divided up.

16 Would that be appropriate?

17 MR. GANNON: Well, I -- I think that
18 to the extent that fees aren't included in the
19 uniformity requirement, it wouldn't be a
20 uniformity violation. If it's an irrational
21 change --

22 JUSTICE KAGAN: Well, I just -- I gave
23 --

24 MR. GANNON: -- that maybe it's
25 subject to some sort --

1 JUSTICE KAGAN: -- I just gave you the
2 hypothetical.

3 MR. GANNON: Yes.

4 JUSTICE KAGAN: They -- they pick
5 these four states for political reasons, nothing
6 to do with any geographical conditions on the
7 ground.

8 MR. GANNON: Understood. And our --
9 our first argument is that to the extent that
10 it's just about fees, that that is not subject
11 to the uniformity requirement. That is a
12 procedural thing that isn't covered by the
13 uniformity requirement. Congress can make
14 distinctions.

15 JUSTICE KAGAN: Even though every
16 creditor --

17 MR. GANNON: To the extent that this
18 is --

19 JUSTICE KAGAN: -- and every debtor --

20 MR. GANNON: To the extent that this
21 is --

22 JUSTICE KAGAN: -- would rather be in
23 these four states?

24 MR. GANNON: To the extent that this
25 is a geographic distinction that you think would

1 be covered by the Uniformity Clause, then we
2 think the question would be whether that is a
3 rational geographic -- geographical distinction.
4 And that's -- that's what the Court allowed in
5 Gibbons and the Regional Railroad Reorganization
6 Act cases and --

7 JUSTICE KAGAN: Well, so far, you
8 haven't really given a reason why this is
9 rational.

10 MR. GANNON: This is rational if you
11 take as given that there are two programs
12 because they had existed for three decades at
13 the time the fee increase was enacted.

14 And I don't think that Congress
15 couldn't rely --

16 JUSTICE KAGAN: So that's the
17 two-statute argument.

18 MR. GANNON: Understood.

19 JUSTICE KAGAN: But the two-statute
20 argument is -- that seems peculiar that you
21 couldn't do it in one statute, but you can kind
22 of divide it up --

23 MR. GANNON: It would be -- it would
24 be --

25 JUSTICE KAGAN: -- so that you can

1 circumvent any uniformity limitation.

2 MR. GANNON: If -- if Petitioner
3 had -- would -- had preserved the challenge to
4 the underlying system, the two programs, and
5 they were done at the same time and there was
6 therefore no other justification Congress would
7 have other than the fact that -- that it -- it
8 wanted to exempt six districts, then I think it
9 would be susceptible to that -- that argument.

10 JUSTICE BARRETT: What if there were
11 no Article III injury to -- to test that?
12 Remember, he said it wasn't clear that anybody
13 could have challenged the initial division
14 because it's not clear that any --

15 MR. GANNON: Well, actually, that's --
16 that's not true because there was a challenge
17 because there were no fees in the bankruptcy
18 administrator districts until 2002. Congress
19 had to authorize the bankruptcy administrator
20 districts to charge fees, and it did so
21 precisely to avoid this potential constitutional
22 challenge.

23 The Ninth Circuit had --

24 JUSTICE GORSUCH: Mr. Gannon --

25 MR. GANNON: -- sustained a challenge

1 --

2 JUSTICE GORSUCH: -- I thought you --

3 MR. GANNON: -- in 19 --

4 JUSTICE GORSUCH: -- I thought earlier
5 you said that -- that there was no
6 constitutional injury between the two systems
7 but for the difference in fees.

8 MR. GANNON: That's correct. And I'm
9 saying in response to Justice Barrett that there
10 was a difference in fees with the --

11 JUSTICE GORSUCH: It's the difference
12 in fees that creates the injury.

13 MR. GANNON: Between 1986 and 2001.

14 JUSTICE GORSUCH: Okay.

15 MR. GANNON: And then again for the
16 13-quarter period that got stranded --

17 JUSTICE GORSUCH: Yeah. Okay.

18 MR. GANNON: -- by the delay in
19 implementation after the 2017 Act.

20 JUSTICE GORSUCH: Then I've got a
21 different question for you on remedies, okay?
22 We have -- we have two options here remedially
23 for backward-looking relief, and let's confine
24 ourselves to that discussion for a moment, claw
25 back or refunds.

1 On the clawback argument, your friend
2 on the other side says, well, there are really
3 two problems. One is maybe a legal problem, a
4 constitutional problem, retroactive --
5 retroactive lawmaking, which is subject to
6 heightened scrutiny in this Court, and second is
7 just a practical problem that a lot of these
8 cases are closed.

9 And then, on the other side, he says,
10 for purposes of refunds, it's just going to be
11 limited to the people who've actually made a
12 complaint. As Justice Sotomayor pointed out,
13 you've got to -- you've got to file a complaint
14 to get your money.

15 And so it may not be that much.
16 And -- and we don't know where your figure of
17 300-some-odd million dollars comes from.

18 Would you care to address those
19 points?

20 MR. GANNON: Sure. I -- I -- I do
21 think, to the extent that he acknowledges that
22 somebody -- some people might not be able to
23 claim their refund or might not claim their
24 refund at this point, that proves that that's
25 not going to be a complete equalization remedy

1 retrospectively by their --

2 JUSTICE GORSUCH: Well, at least for
3 those who complain. I mean --

4 MR. GANNON: That's true. But to the
5 extent that the argument here --

6 JUSTICE GORSUCH: There's always
7 somebody who doesn't complain, I mean --

8 MR. GANNON: Yes, but --

9 JUSTICE GORSUCH: -- and who doesn't
10 file a lawsuit for an injury. So that -- that
11 doesn't work, okay, so let's move on from that.

12 MR. GANNON: But the \$324 million
13 figure is calculated by figuring out which
14 debtors in the U.S. Trustee program districts
15 paid the heightened fee that was associated with
16 at least a million dollars of disbursements in a
17 quarter for any of the 13 quarters --

18 JUSTICE GORSUCH: Right.

19 MR. GANNON: -- in which there was a
20 disparity.

21 JUSTICE GORSUCH: It's the whole
22 universe. It could be up to \$324 million.

23 MR. GANNON: It -- it would be up to
24 324 million. And then --

25 JUSTICE GORSUCH: But do we have any

1 sense of what it actually would be, the number
2 of complaints?

3 MR. GANNON: Well, I think there
4 are -- there is a case pending in the Federal
5 Circuit that was -- that was filed as a class
6 action. It wasn't certified as a class. That
7 would be an opt-in class.

8 I don't know. I don't have an actual
9 number on what it would be. But, to go back to
10 your opening assumption here that if you look
11 retrospectively, there are only two remedies, a
12 refund or a clawback, I'd say two other things.

13 JUSTICE GORSUCH: Well, first, could
14 you address the problems with the clawback
15 approach that your colleague has addressed, the
16 legal and the practical ones?

17 MR. GANNON: Yeah, I would say that
18 the -- that there could be a -- a -- a clawback
19 remedy in the sense that if this Court were to
20 say -- and we think the order of operations is
21 the opposite of what -- of what Petitioner's
22 counsel says.

23 We think that the first question the
24 Court needs to be asking here is, what would
25 Congress have wanted to do here?

1 JUSTICE GORSUCH: Can you just answer
2 my -- my -- my question, though, Mr. Gannon?
3 You know, what's -- what -- there are two
4 problems with the clawback -- I'm going to keep
5 repeating it until you answer it, okay? There
6 are two problems with the clawback that your
7 colleague has identified. One is legal and the
8 other is practical.

9 Could you address those? And then you
10 can say whatever the heck else you want to say.

11 MR. GANNON: And -- I mean, the legal
12 problem, he says there might be some due
13 process-type concerns that would prevent
14 somebody from being charged -- from -- from
15 having to pay this fee after the fact. And I
16 would say perhaps that is true. And that was
17 also true in the other federal cases where we
18 think that there was effectively no
19 retrospective remedy in a circumstance that is
20 like this.

21 And, therefore, I'd -- that's not
22 obviously a legal problem that would prevent the
23 court from rejecting clawback as a remedy.

24 And then -- so practically speaking, I
25 don't know -- we think that McKesson shows us

1 that there doesn't have to be a perfect effort,
2 as does even Petitioner's proposed refund
3 remedy. And we also think that, here,
4 Petitioner had a pre-deprivation remedy. He
5 challenged this rule.

6 JUSTICE GORSUCH: Can I just
7 interrupt, though? On -- on the legal point, as
8 I understand it, you say yes, there probably --
9 or there might well be a due process problem
10 here with retroactive legislation, but that
11 doesn't eliminate clawback as a potential
12 remedy. Is that -- is that the gist of the
13 argument?

14 MR. GANNON: The gist of the argument
15 is, Justice Gorsuch, that the three most
16 analogous cases I have are instances where there
17 was effectively no retrospective equalization
18 when the Court was fixing a -- a mistake like
19 this, a disparate treatment problem, when it
20 recognized that the remedy, the proper remedy,
21 was to eliminate the exception that had given a
22 minority of beneficiaries greater benefits.

23 And so one example is
24 Morales-Santana --

25 JUSTICE GORSUCH: What incentive does

1 a litigant have to bring a constitutional
2 complaint if there's no -- no possibility of
3 retrospective relief?

4 MR. GANNON: Well, that happens every
5 time somebody brings a disparate treatment
6 claim, and the Court concludes that the way
7 we're going to equalize the disparate treatment
8 is by eliminating the exception where somebody
9 else was getting a benefit that the plaintiff is
10 seeking and doesn't get.

11 That's what happened in
12 Morales-Santana, where the petitioner was
13 saying, I should be made a U.S. citizen because
14 my father was discriminated against. And the
15 Court said no, you don't get citizenship even
16 though you are a prevailing party in an equal
17 protection case. You proved that the statute
18 was unconstitutional. And the Court invalidated
19 the more generous exception there, and -- and --
20 rather than the more restrictive rule, but it
21 then did not do anything to operationalize that
22 retrospectively. It did not go back and say
23 everybody who had benefited from the exception
24 has to give their citizenship back.

25 Similarly, in the American Association

1 of Political Consultants case, the Court's
2 remedy there was to invalidate the exception for
3 government debt collection, robo calls, and --
4 but the plurality's opinion specified in
5 Footnote 12 that those who had violated the
6 general prohibition that was in place on robo
7 calls would still remain liable and also
8 acknowledged that notice concerns would prevent
9 those who had been complying with the government
10 debt collection exception, which was now
11 invalidated, they would not be on the hook
12 because of notice concerns.

13 CHIEF JUSTICE ROBERTS: Well, but one
14 thing we --

15 MR. GANNON: But that didn't cause the
16 plurality to say that the -- that the remedy
17 would be to say that that means we have to let
18 everyone else off the hook under the majority
19 rule.

20 CHIEF JUSTICE ROBERTS: Well, one
21 thing we didn't say is, because of that, because
22 of the prospect that you might not actually get
23 anything, that you don't have a case and that we
24 don't go and reach the merits of your case. It
25 just leaves you the option of deciding how you

1 want to go about equalizing the violation that
2 the other side has shown.

3 And you'd say what you -- I don't mean
4 to -- I'd be surprised if the government thought
5 it could go and claw back from all the other
6 debtors the fees that -- claw back rather than
7 equalize by giving back the -- the fees.

8 But, in any event, a lot of the
9 examples you gave of things that you could have
10 disuniformity -- I don't mean to beg the
11 question, but disparate treatment between a
12 particular thing and that's not a violation, or
13 my example about the, you know, computer
14 purchases, that's not a violation.

15 It seems to me that what might make
16 this case different is that you're dealing with
17 cold, hard cash, and that is a big deal in
18 bankruptcy. It doesn't matter what kind of
19 computers you're using. But that's a
20 significant factor.

21 And if you have a choice as a debtor,
22 you know, where do you want to file for
23 bankruptcy, you'd want to file in a place that
24 you're not going to lose a lot of your -- a lot
25 of what is at stake paying fees that are how

1 many times greater in -- in -- in the 48 than in
2 the two?

3 MR. GANNON: For -- for -- this only
4 covered the debtors who are paying more than a
5 million dollars in disbursements. It could be
6 up to seven times greater, seven-plus times
7 greater.

8 CHIEF JUSTICE ROBERTS: All right.

9 MR. GANNON: But then --

10 CHIEF JUSTICE ROBERTS: Well, that
11 makes a big difference if you're running out of
12 money, right?

13 MR. GANNON: Yes, it could --

14 CHIEF JUSTICE ROBERTS: And that's
15 different than the sort of procedural examples,
16 I think, that you gave. The -- the differences
17 in those situations, I don't think somebody
18 would care whether they're, you know, one type
19 of computer or -- you know, that was my example,
20 which may not be a very good one -- one type of
21 computer or another.

22 But, as you were going through
23 examples, you could have this, you know,
24 disuniform -- disparate treatment, it struck me
25 that that really wouldn't make a difference to

1 the debtor or creditor, but this example might.

2 MR. GANNON: Well, the -- the truth is
3 that for most of the time the fees were actually
4 equal and Congress expected them to be equal
5 here. But I think, to the extent -- I'm not
6 sure whether you mean this question to be part
7 of the remedial questioning. I -- we --

8 CHIEF JUSTICE ROBERTS: No.

9 MR. GANNON: I was -- I was not trying
10 to contest that somebody would lack standing to
11 bring such a challenge if the remedy at the end
12 of the case ends up being that the other guy
13 loses the benefit that I'm claiming --

14 CHIEF JUSTICE ROBERTS: No, not as
15 part --

16 MR. GANNON: -- that I should be able
17 to get here.

18 CHIEF JUSTICE ROBERTS: -- not as part
19 of the remedy but as part of whether or not it
20 violates the constitutional provision if what is
21 not treated the same way really makes a
22 difference to people in bankruptcy.

23 MR. GANNON: I -- I take the point
24 that it -- that it -- it may make a difference
25 and that -- that -- that money matters in a

1 bankruptcy proceeding, but I mentioned that
2 there are lots of other provisions of law that
3 will affect how much money is available for
4 distribution in the bankruptcy at the end, and
5 we don't think that those are covered by the
6 uniformity requirement.

7 And also, to the extent that there are
8 the two different programs and Congress decided
9 that one of them should be self-funded, then
10 it's -- that is itself another rule that
11 deserves respect here.

12 And I would also observe with respect
13 to the self-funding point that the bankruptcy
14 administrator program fees, when they are being
15 collected, also offset congressional
16 appropriations. So this isn't an instance where
17 one program is completely self-funding, the
18 other one is completely taxpayer-supported, but
19 it's one where, because the judiciary and the
20 bankruptcy administrator program have additional
21 funding streams, Congress didn't have to worry
22 about the shortfall when it was enacting this
23 particular fee increase in 2017.

24 But, if -- if I could go back and just
25 add one other case to my answer for Justice

1 Gorsuch about the -- the remedial situations,
2 one of them did involve money and it involved
3 this issue. When the Ninth Circuit invalidated
4 the two programs in the 1990s, it said the
5 reason they were -- that it was unconstitutional
6 is because of the fee disparity.

7 And they said, so you are right, you
8 are complaining that you should not have to pay
9 this fee because some people in some other state
10 wouldn't have to pay the fee. And the Ninth
11 Circuit said that's a violation of the
12 uniformity requirement. The fix is to carve out
13 the exception.

14 We know Congress would actually want
15 to have the U.S. Trustee program. We're not
16 going to flip everything upside down and
17 substitute the 3 percent for the 97 percent.
18 We're just going to take the 97 percent and --
19 and -- and pull it across. And at that point
20 then, the Ninth Circuit's remedy was to say:
21 Pay the fee. You have to pay the entire fee
22 because we severed the exception.

23 And so we think that those are the
24 cases that are the analogous remedy here, which
25 is why, if the Court were to -- to conclude that

1 there is disparate treatment here that violates
2 the Uniformity Clause, that the judgment should
3 be that the statute's unconstitutional to that
4 extent, but it's the exception that is invalid.
5 The 2020 statute does not disagree with that at
6 all because Congress did not order refunds.

7 My friend says Congress only had a
8 prospective remedy. But Congress pointedly did
9 not give refunds to everyone who had overpaid
10 under their theory.

11 And then the effective remedy here is
12 going to be effectively only prospective.
13 Unless you insist that there needs to be some
14 sort of collection, then we think that the
15 Judicial Conference would do what it says on its
16 notices, which is refer a claim -- may I --

17 CHIEF JUSTICE ROBERTS: You can finish
18 your sentence.

19 MR. GANNON: We -- we may refer a
20 claim for a debt to the United States to the
21 Treasury for collection. And so there could
22 well be a practical way in which those could be
23 collected.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 Just one more question on the remedy.

2 The question on which we granted cert was
3 whether the Bankruptcy Judgeship Act violates
4 the uniformity requirement of the Bankruptcy
5 Clause by increasing quarterly fees solely in
6 U.S. Trustee districts.

7 Now we could answer that question yes
8 or no without dealing with any remedy question
9 at all, right?

10 MR. GANNON: I think you could.

11 CHIEF JUSTICE ROBERTS: Okay. Thank
12 you.

13 Justice Thomas, anything?

14 Justice Breyer?

15 Justice Sotomayor, anything further?

16 Justice Kagan? No?

17 JUSTICE KAVANAUGH: A couple
18 questions. You had mentioned in your brief the
19 Wynne case as well, the Maryland case. How is
20 that relevant to the remedy question?

21 MR. GANNON: We cited it for the
22 proposition that there the Court recognized that
23 it was another one of these cases where there is
24 disparate treatment and the plaintiff, even
25 though he has established that the law in

1 question was unconstitutional, it doesn't mean
2 that the plaintiff may get any practical relief
3 at the end of the day in the terms of getting
4 the money back.

5 Instead, the fix might be that there
6 is no longer going to be discriminatory
7 treatment because the other guy is going to no
8 longer get the benefit.

9 JUSTICE KAVANAUGH: The next -- we've
10 been acting as if the 2017 legislation was a
11 deliberate congressional choice to further a
12 pilot program that involved disparate treatment.
13 At least that's been the supposition.

14 But that's actually wrong. Congress
15 in 2017 was operating on an assumption that we
16 raise the fees in the one, they'll be raised in
17 the other. And that turns out not to pass for
18 several months, right, which creates the issue
19 in this case.

20 So, when we rely on -- when you say in
21 response to Justice Kagan Congress was
22 experimenting -- not in 2017, they weren't doing
23 that. They thought it had to be uniform, I
24 think, or thought it should be uniform, and that
25 raises my question.

1 In 2020, they then say in the text of
2 the statute, long-standing intention of Congress
3 that the fee requirements remain consistent
4 across all federal judicial districts.

5 My questions there are, one, how
6 long-standing do you think that was? And, two,
7 do you think that's a constitutionally informed
8 statement that Congress made or a policy
9 statement or both?

10 MR. GANNON: I -- I think it's both.
11 We agree with you this is -- this is a separate
12 argument that doesn't require the Court to get
13 into the question of what are the scope of the
14 Uniformity Clause, whether this is a
15 geographically isolated problem is being
16 legitimately dealt with. It's a completely
17 separate argument that we think that the 2017
18 statute required equal fees.

19 And it's not an argument that says may
20 equals shall. It's an argument that says, if
21 you look at everything Congress has done in this
22 space going back to the 2000 law, when Congress
23 first said "may," it was responding to a request
24 from the Judicial Conference because it was
25 solving the problem identified in the Ninth

1 Circuit case from the 1990s, a potential
2 Uniformity Clause violation -- uniformity
3 requirement violation based on the fee
4 differential.

5 The Judicial Conference said, well,
6 let us charge the same fees and there won't be a
7 uniformity problem. Congress enacted the
8 statute that said the Judicial Conference may
9 impose equal fees -- that was the word that it
10 used -- equal fees.

11 The Judicial Conference adopted a
12 standing order that said we will charge the fees
13 in the statute as it is amended from time to
14 time. A fee increase happened in 2007, and it
15 was ported across to the six districts in the
16 bankruptcy administrator districts without
17 incident.

18 And so, in 2017, when Congress amended
19 (a)(6) again, it had every expectation the
20 Judicial Conference would indeed have its
21 standing order take effect and, therefore --

22 JUSTICE KAVANAUGH: And that leads to
23 the question, what do we make of all that for
24 the constitutional issue? Is that -- I mean,
25 it's not a deliberate congressional choice in

1 2017. It's kind of a foul-up, right? And I
2 don't know which way that cuts. Do you want to
3 give me --

4 MR. GANNON: Yeah, I --

5 JUSTICE KAVANAUGH: -- 30 seconds on
6 which way you think that cuts?

7 MR. GANNON: I mean, I think that it
8 means that Congress thought that the statute
9 would have equal fees across all 50 states.
10 That was its intention. And in 2020, when it
11 says this has always been our intention, we know
12 that because the only reason it authorized these
13 fees was to avoid the uniformity problem if
14 there would be one. And, therefore, it wouldn't
15 have done that if it allowed unequal fees.

16 And so all along the purpose of (a)(7)
17 was to allow -- was to allow the judiciary to
18 take steps to avoid the uniformity problem. And
19 I think that that's constitutionally significant
20 because it means that Congress was not
21 legislating a non-uniform outcome here. It
22 fully expected that as in 2007, the 2017 fee
23 increase would be implemented without a delay.

24 JUSTICE KAVANAUGH: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Barrett? No?

2 Thank you, counsel.

3 Mr. Geyser, rebuttal?

4 REBUTTAL ARGUMENT OF DANIEL L. GEYSER

5 ON BEHALF OF THE PETITIONER

6 MR. GEYSER: Thank you, Mr. Chief
7 Justice.

8 My friend talks a lot about what
9 Congress intended and expected and might have
10 hoped, but this Court normally looks at what
11 Congress actually wrote in the statute.

12 And my friend says that "may" doesn't
13 mean "shall." It doesn't. And, in fact,
14 Congress used the word "may" in contrast to the
15 word "shall" in the very interlocking provision
16 that they were dealing with and then followed it
17 up in (a)(7) with the next sentence that uses
18 the word "shall" twice.

19 This Court doesn't presume that
20 Congress uses different words in the same
21 statute because it thinks they mean the same
22 thing. So I think it's very clear and
23 especially when the Judicial Conference is
24 telling Congress, we have discretion to
25 implement this or not.

1 That means that if Congress wants to
2 eliminate that discretion and secure uniformity,
3 they have to do it on the face of the statute.

4 My friend suggests that this is not a
5 law on the subject of bankruptcy because the
6 Constitution draws a distinction between
7 substantive rules and procedural rules.

8 I don't see that anywhere in the text
9 of the Bankruptcy Clause itself. It talks about
10 uniform laws on the subject of bankruptcies, not
11 on substantive bankruptcy law or procedural
12 bankruptcy law. The -- the distinction too
13 between substance and procedure is notoriously
14 difficult to draw.

15 I think the Court normally tries not
16 to get into that thicket unless it's
17 unavoidable. I think it's odd to suggest that
18 as a constitutional matter, the restraint on
19 Congress's power should be invited through this
20 incredibly difficult line to police.

21 My friend suggests that we're wrong
22 that the Constitution requires uniform laws on
23 the subject of bankruptcy, and it's strange to
24 think that that -- that Congress or the
25 Constitution would tolerate deviations at the

1 local level. This Court has already explained
2 why the government is wrong in *Moyses*.

3 Congress -- or the Court said that
4 Congress can adopt varying state exemptions
5 without running afoul of the uniformity context
6 as long as the choice to the states is the same.
7 It can have disparate local effects that has no
8 difference on the constitutional question
9 because it's a uniform federal standard.

10 My friend suggests that -- that the
11 Court, in looking at the exemptions for the dual
12 system, the Court should take into account the
13 sort of shadow lawmaking that goes on behind the
14 scenes of what states asked for exemptions from
15 the -- from the program and which states didn't.

16 That's not the way this Court
17 construes statutes. You look at the law that
18 Congress passed, not what political forces went
19 into the law to sort of rewrite the terms that
20 Congress actually chose.

21 For clawback as a remedy, I think that
22 the Chief Justice is exactly right that it would
23 be surprising for Congress to say let's go and
24 find every creditor, professional, administrator
25 that was involved in any of these closed cases,

1 track them down and try to get them to pay their
2 pro rata share of the fee, which is what
3 Congress would have to do to actually equalize
4 the treatment.

5 I think that as Justice Gorsuch
6 pointed out, there is a serious due process
7 problem, which my friend -- which my friend
8 acknowledges. And I think instead of resolving
9 one series of constitutional litigation, that's
10 a remedy that just invites a whole nother series
11 of constitutional questions and brand-new
12 litigation over a fee statute that was plainly
13 non-uniform on its face.

14 Unless the Court has further
15 questions.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 MR. GEYSER: Thank you.

19 CHIEF JUSTICE ROBERTS: The case is
20 submitted.

21 (Whereupon, at 12:21 p.m., the case
22 was submitted.)
23
24
25

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